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The position of the defendant should be the moral equivalent of that of a wilful wrongdoer if the rule of policy denying relief to a negligent plaintiff is to become non-effective.

EFFECT UPON FORECLOSURE SALE OF THE DEATH OF MORTGAGOR BEFORE CONFIRMATION. A common statute provides that upon default of payment by the mortgagor, the mortgagee may file a petition or commence *scire facias* proceedings for foreclosing the equity of redemption. By the decree or judgment thereunder a new date is fixed on or before which the mortgagor may redeem, and at which, if the mortgagor has not redeemed, the realty will be sold by an officer of the court and the proceeds applied to the payment of the debt. In some states, where foreclosure is accomplished by the sale under *scire facias* proceedings, no confirmation is required. More commonly, however, confirmation is necessary. In case the mortgagor dies during these proceedings, the validity of the foreclosure has been recently questioned. *Effect upon a Foreclosure Sale of the Death of the Mortgagor before Confirmation*, by Edward M. Winston, 58 Central L. J. 103 (Feb. 5, 1904). Until the confirmation of the sale, it is contended, the mortgagor's interest continues. Since an estate will accordingly pass to the heir on the death of the mortgagor, Mr. Winston concludes that the foreclosure is invalid, unless the heir is made a party to the proceedings. The fact that a contrary rule has been generally adopted and the reason for its adoption are ignored by Mr. Winston.

The essential nature of foreclosure proceedings requires that the holder of the equity of redemption be a party to the decree. If before the decree is rendered, therefore, the mortgagor dies and proceedings are not revived against the heir, the decree and any sale thereunder are plainly void. *Hunt v. Acre*, 28 Ala. 580. If, however, the mortgagor dies after the decree is rendered, it has been held that reviver against his successor is not necessary to the validity of subsequent proceedings. *Hays v. Thomae*, 56 N. Y. 521; *Trenholm v. Wilson*, 13 S. C. 174. Support for this view is sought in the rule that a decree obtained in the lifetime of the defendant-party may be enrolled after his death. See *Harrison v. Simons*, 3 Edw. (N. Y.) 394, 395. This analogy between enrollment and the confirmation of a foreclosure sale, it is submitted, is fallacious. Enrollment is a non-discretionary and ministerial act. *Sheffield v. Duchess of Buckingham*, West 673. The confirmation of the foreclosure sale by the court, on the other hand, is the definitive act in the foreclosure proceedings. The foreclosure sale passes no title to the purchaser. *Woehler v. Endter*, 46 Wis. 301. Only upon the confirmation of the sale, which rests entirely within the discretion of the court, does title pass to the purchaser. *Brown v. Isbell*, 11 Ala. 1009. When the equity of redemption is finally foreclosed, the holder, it would seem, should be before the court. One jurisdiction has already held that, upon the death of the mortgagor before the foreclosure sale, reviver is necessary against his successor. *Glenn v. Clapp*, 11 G. & J. (Md.) 1. Upon principle it seems sound, as Mr. Winston contends, to make reviver of proceedings against the successor essential to the validity of the foreclosure, when the mortgagor dies at any time before the confirmation.

MALICIOUS TORTS. — The attempt is made in a suggestive and noteworthy article of recent date, remarkable for its keen analysis and its accuracy of expression, to separate and distinguish the different kinds of questions that may arise in a case of malicious tort. *Malicious Torts*, by Henry T. Terry, 20 L. Quart. Rev. 10 (Jan., 1904). The author begins with an elaborately wrought discrimination between the various kinds of rights and duties recognized in the law. To each legal right corresponds a particular kind of legal duty. When a breach of the corresponding duty results proximately in a violation of a right, a

tort action arises. To the more tangible and definite rights, which the author styles "distinct," including, for example, rights of person and property, correspond duties peremptory in character, or "duties of reasonableness" or "duties of mere intention." But to the vaguer right which Mr. Terry terms the "right of pecuniary condition" — which seems to be "the holding of value or purchasing power," and which is distinguished from property in that it need not be a right in specific things at all, — to this right the only corresponding duty is to abstain from malicious acts. That there is such a duty he thinks perfectly clear. But to this duty there are exceptions so numerous as to destroy the rule in most cases where the act cannot be considered wrongful in some collateral aspect. Thus, the rule does not apply to acts done in the exercise of "distinct" rights, or in the enforcement of a contract, or of a right of action. And the questions raised by such cases as *Allen v. Flood*, — whether there is a duty not to maliciously persuade a person to break his contract with the plaintiff, or to refuse to enter into relations with him, and whether a duty is broken when such acts are done by a combination, if not when done by a single individual — are questions in each case of admitting exceptions to the general rule; and they depend on considerations of justice and policy, not on any theory of malice. The first question to be asked in such a case is whether any right has been violated; and if so, whether it is not a right to which a duty involving no more than mere intention corresponds. If the first of these questions is answered in the negative, or the second in the affirmative, obviously any discussion of malice is irrelevant and confusing.

It may be doubted whether Mr. Terry has entirely cleared up the confusion in the law on this subject, of which he complains. However sound his analysis, it is not simple. There is ample room, it would seem, for further confusion in drawing the line he suggests between "distinct" and "vague" rights; and, after all is said, he finds the test to be that which has consistently been applied, justice and policy.

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